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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 364

ALBERT SMITH,

Petitioner,

vs.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

ALBERT SMITH,
Pro se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 364

ALBERT SMITH,

vs. *Petitioner,*

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Albert Smith, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered in the above cause on June 3, 1940, affirming the judgment of the District Court of Lancaster County, Nebraska.

Summary Statement of the Matter Involved.

The petitioner, Albert Smith, filed his petition for a writ of habeas corpus in the District Court of Lancaster County, Nebraska, on or about February 14, 1940, complaining of his detention in the State Penitentiary of Nebraska, at Lincoln, alleging that he is being held in violation of his constitutional rights (R. 1-13).

On or about September 19, 1932, your petitioner, an itinerant chimney sweep who was 56 years of age and without the slightest vestige of a criminal record at the time, was arrested at Arapahoe, Furnas County, Nebraska, without a warrant and detained in the Furnas County jail. Later the same day your petitioner was removed to the Buffalo County jail at Kearney, Nebraska, where he was held for two days without being told of the cause of his arrest. On the third day after his arrest your petitioner was told that he was wanted in Valley County, Nebraska, on a charge of Common Burglary, and was advised that if he would agree to plead guilty to the charge he would be dealt with leniently; if he did not so agree, he might be accidentally and seriously injured. With no other recourse to follow, your petitioner agreed, on the condition that such an arrangement was first sanctioned by the County Attorney of Valley County. Accordingly, the Valley County Sheriff, Mr. George S. Round, arranged for your petitioner to talk by long distance telephone with Mr. George A. Munn, the County Attorney of Valley County. Then, in the presence of Sheriff Round and Mr. Otto Dudschus, a Deputy Sheriff of the State of Nebraska, your petitioner conversed, by long distance telephone, with a person identified by Sheriff Round as Mr. Munn, who was likewise identified as being the County Attorney of Valley County. During this conversation Mr. Munn agreed to a bargain in which it was understood that if your petitioner would plead guilty to a charge of Common Burglary, the sentence meted out to him by the trial court would not exceed three (3) years imprisonment in the Nebraska State Penitentiary. Following this telephone conversation and agreement, your petitioner was transferred to the Hall County jail at Grand Island, Nebraska, by the aforesaid Mr. Dudschus, where he was confined for about three more days. Then, on or about September 24, 1932, your petitioner was taken to the

Valley County jail at Ord, Nebraska, and there confined pending trial.

During the following two or three days your petitioner had many conversations with Sheriff Round and County Attorney Munn, and on each occasion your petitioner requested these officials to give him a copy of the charge filed against him. In response, your petitioner was told that the charge had not yet been filed, that it was not necessary for him to have a copy anyway, THAT EVERYTHING HAD BEEN "FIXED." Finally, on or about September 27, 1932, at about 1:30 in the afternoon, WITHOUT EVER HAVING HAD A COPY OF A CHARGE SERVED UPON HIM (R. 15), AND WITHOUT ANY KNOWLEDGE THAT A CHARGE HAD YET BEEN FILED, your petitioner was taken before the District Court of the Eleventh Judicial District of Nebraska, in and for Valley County, and summarily arraigned for trial. Upon being advised of this fact by the court, your petitioner requested the advice and assistance of legal counsel, but was informed by the court that counsel was not necessary because of the agreement made between the County Attorney and the defendant, your petitioner. Because of this statement by the court, your petitioner truly believed that the case had been "fixed" as promised, and, with the blind faith of a man trusting his friends (the Sheriff and the County Attorney of Valley County), your petitioner paid little attention to a charge unintelligibly read in the jargon of the courtroom and, when requested to do so by the County Attorney, entered a plea of guilty. To his consternation, your petitioner then heard the court sentence him to a term of twenty (20) years imprisonment in the Nebraska State Penitentiary.

Your petitioner had never before been in a courtroom for any purpose whatsoever, and his knowledge of law and legal procedure was, and still is, extremely limited. Notwithstanding this fact, and immediately after recovering

his mental equilibrium, your petitioner protested vigorously to the court, explaining that he had never seen a copy of the charge filed against him, although he had requested a copy of it several times. This protest was ignored, so your petitioner requested permission of the court to withdraw his plea of guilty, and, at the same time, again requested that counsel be appointed to advise and assist him, and that he be given an adequate opportunity to defend himself. But these requests and protests were all to no avail, for the court told your petitioner that it did not matter whether or not he had seen a copy of the charge filed against him; that it did not matter whether or not he had the aid and advice of legal counsel; that a plea of guilty could not be withdrawn in that court; that it did not matter, now, whether or not he had had an adequate opportunity to defend himself, because he had pleaded guilty to the charge as filed and that settled it, insofar as the court was concerned. Further protest was useless, and, within the hour, your petitioner was on his way to the penitentiary in the custody of Sheriff Round.

Not until after your petitioner was committed to the penitentiary did he discover that he had been duped and inveigled into entering a plea of guilty to a charge of burglary with explosives, and not until seven (7) years later, in October, 1939, did your petitioner actually see a copy of the charge, and then only after he had purchased it for the sum of one dollar and fifty cents, ($1.50). Being without the necessary funds, and knowing nothing at that time of appellate procedure, your petitioner was unable to carry an appeal to the Supreme Court of Nebraska. Likewise, his entreaties to the Board of Pardons of the State of Nebraska have been equally futile.

Finally, in desperation, after purchasing a certified copy of the Information, Judgment, and Sentence (R. 6-10, incl., "Exhibit A"), as the same appears of record in

the office of the Clerk of the Valley County District Court, and, upon the foundation laid by these records of the trial court, your petitioner prepared a petition for a writ of *habeas corpus*. This petition was filed with the District Court of Lancaster County, and alleged that the judgment and sentence of twenty years, and your petitioner's confinement as a result thereof, are void by reason of the fact that (1) the petitioner was deprived of his constitutional right to know the nature and cause of the accusation for which he was to answer, and to be served with a copy thereof, (2) the petitioner was deprived of his constitutional right to have the advice and assistance of competent legal counsel; (3) the petitioner was deprived of his constitutional right to trial by a court of competent jurisdiction, and (4) the petitioner did not knowingly wilfully, intelligently, nor expressly waive any of the three foregoing rights, each of which is guaranteed by the Sixth Amendment to, and imbedded in the due process clause of the Fourteenth Amendment to, the Constitution of the United States; and the deprivation of each right is a denial of the equal protection and due process of law guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States. Attached to and made a part of this petition for *habeas corpus* was a motion and affidavit *in forma pauperis*, requesting the appointment of legal counsel to assist in the preparation and prosecution of petitioner's action.

Finally, on or about February 28, 1940, after ignoring the aforesaid motion for the appointment of counsel, the District Court of Lancaster County dismissed the petition for a writ of *habeas corpus* without a hearing (R. 13). Following this dismissal, the Honorable E. B. Chappell, Judge of the Lancaster County District Court, wrote your petitioner a letter, informing him that, "IF THE STATEMENTS MADE IN YOUR PETITION ARE TRUE, YOU PROBABLY SUFFERED AN INJUSTICE," (R. 15).

Feeling certain that a misunderstanding existed, your petitioner filed a motion for reconsideration, hoping that the Court would take the time and trouble to verify the statements your petitioner had made in his original petition (R. 13-21). But the court took no such action, and this motion, too, was overruled (R. 21). Sincerely believing that he had again suffered an injustice at the hands of a court of the State of Nebraska, your petitioner immediately instituted appellate proceedings *in forma pauperis,* requesting by motion, among other things, the appointment of counsel to assist in the preparation of the appeal (R. 23-25). This motion was also overruled (R. 27).

Feeling certain that justice would prevail in the Supreme Court of Nebraska, your petitioner prepared his own appeal and, on or about April 29, 1940, filed a transcript of the proceedings in the District Court of Lancaster County with the Clerk of the Supreme Court of Nebraska, together with a motion for the appointment of counsel, a motion for allowance of cost of printed briefs on appeal, an alternate motion for permission to file typewritten briefs on appeal with a sample brief attached as showing for the consideration of the court, and an alternate motion for appeal to be heard on the record, all in forma pauperis (R. 1-33, incl. For above motions, see R. 28-33).

In the above cited motions, your petitioner pointed out to the Supreme Court of Nebraska that he was a pauper, that he was making every effort a pauper could make to complete his appeal in accordance with the rules of the court, and that, unless one of the aforesaid motions was allowed, he could not possibly complete his appeal. Likewise, your petitioner pointed out to the Supreme Court of Nebraska that Article I Section 24 of the Constitution of the State of Nebraska forbade the denial of the right to appeal, and that a denial of all of the aforesaid motions would be tantamount to a denial of the right to appeal because of

the petitioner's impoverished circumstances. IN SUPPORT OF HIS MOTIONS, YOUR PETITIONER POINTED OUT TO THE SUPREME COURT OF NEBRASKA THAT IT HAD, ON AT LEAST SEVEN (7) PREVIOUS OCCASIONS DURING THE PAST YEAR, ALLOWED IMPOVERISHED APPELLANTS THE RIGHT TO FILE TYPEWRITTEN BRIEFS, AND THAT EQUAL JUSTICE TO ALL PAUPERS COULD ONLY BE METED OUT BY ALLOWING YOUR PETITIONER THE SAME RIGHT (R. 30-31). In support of his appeal, your petitioner charged the following errors to the District Court of Lancaster County in his sample brief attached for showing: (1) The court erred in holding that the deprivation of the appellant's right to know the nature and cause of the accusation for which he was to answer, or to be served with a copy thereof, is not a denial of the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (2) The court erred in holding that the deprivation of the appellant's right to have the advice and assistance of competent legal counsel is not a denial of the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (3) The court erred in holding that the deprivation of the appellant's right to a trial by a court of competent jurisdiction is not a denial of the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (4) The court erred in holding that a plea of guilty seduced from the defendant, the appellant herein, by an unfulfilled promise of leniency is a waiver of all constitutional rights and is not a denial of the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (5) The court erred in holding that the denial of the equal protection and due process of law guaranteed

by the Fourteenth Amendment to the Constitution of the United States is not grounds for the issuance of a writ of *habeas corpus*.

Afterwards, on May 20, 1940, UPON CONSIDERATION OF THE AFORESAID MOTIONS AND THE ERRORS CHARGED IN THE SAMPLE BRIEF ATTACHED THERETO FOR SHOWING, the Supreme Court of Nebraska, by the Chief Justice thereof, the Hon. Robert G. Simmons, rendered the following order:

> "This cause coming on for hearing upon motion of appellant for the appointment of counsel and for the allowance of the cost of printed briefs on appeal, or in the alternative for leave to file typewritten briefs, or to be heard upon the record to which motion was attached typewritten brief which appellant asked leave to file, was submitted to the court. And the court having examined the tr nscript from the district court of Lancaster county, which transcript contains appellant's original petition for writ of *habeas corpus* containing a brief in support of such petition, and having also examined the typewritten brief of appellant tendered herein, and being fully advised in the premises, finds that the appeal herein is without merit and that the record contains no probable error. It is, therefore, considered, ordered and adjudged that said motion be, and the same hereby is, denied." (R. 33-34.)

Considering this action of the Supreme Court of Nebraska to be adverse to the true concepts of equal justice to all, and in an effort to obtain the pauper's prerogative, the right to file typewritten briefs, and thus complete his appeal, your petitioner sought permission of this Honorable Supreme Court of the United States to file a petition for a writ of *mandamus*, naming the Supreme Court of Nebraska, and all of the members thereof individually, as respondents. On June 3, 1940, this Honorable Court denied the petitioner's motion for permission to file the aforesaid peti-

tion for a writ of mandamus, and, on the same date, the Supreme Court of Nebraska rendered a final judgment affirming the dismissal of your petitioner's original petition for a writ of *habeas corpus* by the District Court of Lancaster County (R. 34). It is this final judgment of the Supreme Court of Nebraska, and the proceedings in the courts of the State of Nebraska leading up to this final judgment, which your petitioner wishes to have reviewed by this Honorable Court by the process of *certiorari*.

Jurisdiction.

1.

The statutory provision is United States Judicial Code, Section 237b, as amended February 13, 1925, 43 Stat. 937.

2.

The date of judgment, which has not been officially reported, is June 3, 1940, on which date the Supreme Court of the State of Nebraska, the highest court of the State in which a decision could be had where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States, rendered a final judgment affirming the order and judgment of the District Court of Lancaster County, Nebraska, denying the petitioner's petition for a writ of *habeas corpus* (R. 34). There was no opinion rendered by the Supreme Court of Nebraska.

3.

That the nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237b, *supra*, appears from the following:

The petitioner herein specifically raised four separate and distinct Federal questions in his original petition for a writ of *habeas corpus* (R. 4-6), all of which were

considered and ambiguously denied by the District Court of Lancaster County in a blanket dismissal of the petition (R. 13), later followed by an admission from the court that the petitioner had "probably suffered an injustice" (R. 15). The claim of constitutional rights was also specifically raised by the petitioner, and considered by the Supreme Court of Nebraska, in the form of an assignment of errors appearing in your petitioner's brief submitted for showing. At no time during the entire proceedings in the courts of the State of Nebraska has the respondent made a single denial of the Federal questions raised by your petitioner. The claims that were made by your petitioner and denied by the State courts are:

That the District Court of the Eleventh Judicial District of Nebraska, in and for Valley County, denied your petitioner the due process of law and equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that:

(a) He was not informed of the nature and cause of the accusation for which he was to answer, nor was he served with a copy thereof;

(b) He was denied the right of counsel together with the accustomed incidents of consultation and preparation for arraignment and trial as provided by law;

(c) He was deprived of a fair, impartial, and deliberate trial by a court of competent jurisdiction;

(d) He did not waive any of the aforesaid constitutional rights, nor does any such waiver appear upon the record, and the deprivation of these constitutional rights by a play upon the ignorance of your petitioner by the trial court and the members thereof flouts the basic principle that all people must stand on an equality before the bar of justice in every American court;

(e) The plea of guilty was likewise made under such circumstances as to render it illegal and insufficient, being entered after false representations had been made to the petitioner by the members of the court.

The following cases, among others, sustain the jurisdiction of the court:

Frank v. *Mangum*, 237 U. S. 309, and *Snyder* v. *Massachusetts*, 291 U. S. 97, established that the failure to include notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to the settled course of judicial proceedings as established by the law of the State, is a denial of due process of law and equal protection of the laws in the sense of the Fourteenth Amendment to the Constitution of the United States.

Powell v. *Alabama*, 287 U. S. 45, established that in a State criminal prosecution the aid and assistance of competent legal counsel, as required by the Sixth Amendment to the Constitution of the United States, is essential to the due process of law required by the Fourteenth Amendment to the Constitution of the United States, and in *Johnson* v. *Zerbst*, 304 U. S. 458, it was stated that the denial of constitutional rights to the accused person deprives the trial court of jurisdiction. See also, *Strauder* v. *West Virginia*, 100 U. S. 303; *Neal* v. *Delaware*, 103 U. S. 370; and *Brown* v. *Mississippi*, 297 U. S. 278, all of which are authority for the view that the duty of maintaining constitutional rights of a person on trial for his life or liberty transcends mere rules of procedure.

Patton v. *United States*, 281 U. S. 276, and *Johnson* v. *Zerbst*, *supra*, are authority for the fact that the express and intelligent consent of the defendant must be had before any waiver can become effective, and that it is the bounden duty of a trial judge to determine whether there is an intelligent and competent waiver, by the accused, of any of

the rights guaranteed by the Constitution of the United States.

Powell v. *Alabama, supra,* and *Grosjean* v. *American Press Co.,* 297 U. S. 233, are authority for the proposition that certain fundamental rights, safeguarded by the first eight amendments to the Constitution of the United States against Federal action, are also safeguarded against State action by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, "and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."

Questions Presented.

1. Is an accused deprived of his liberty without due process of law and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, where he was not informed of the nature and cause of the accusation for which he was to answer, and where he was refused the right to be served with a copy of the charge filed against him?

2. Is an accused deprived of his liberty without due process of law and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, where he had no education and was without legal skill or knowledge, and was financially unable to employ counsel, where he was placed on trial and refused the right to the advice and assistance of legal counsel?

3. Is an accused deprived of his liberty without due process of law and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, where he is tried and sentenced, without a conviction showing upon the record, to a term of twenty (20) years imprisonment at hard labor by a court which failed to acquired competent jurisdiction as required by the Constitution and laws of a State?

4. Can it be held to be due process of law and equal protection of the laws under the requirements of the Fourteenth Amendment to the Constitution of the United States where an accused, ignorant and uninstructed by legal counsel, is duped and inveigled by officers of the trial court into entering a plea of guilty to a charge of which he knew nothing because it had been falsely represented to him orally, and does such a plea entered under such circumstances waive all the fundamental rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States?

5. Is an accused, tried and sentenced under such circumstances, where the state law provides no other remedial process for the correction of such wrong, entitled to be released upon his petition for *habeas corpus?*

6. Did the Supreme Court of Nebraska err in affirming the judgment of the District Court of Lancaster County wherein it was held that a petition filed by an accused alleging the above circumstances, failed to set out a cause of action for relief by petition for *habeas corpus?*

Reasons Relied On for the Allowance of the Writ.

The final judgment of the Supreme Court of Nebraska, affirming the judgment of the District Court of Lancaster County dismissing the petition for a writ of *habeas corpus,* decided, substantial Federal questions of substance in a way probably not in accord with applicable decisions of this Court, because this final judgment has the effect of contradicting the fact that:

1. The failure of the officers of the trial court to inform the petitioner of the nature and cause of the accusation for which he was to answer, or to serve him with a written copy thereof, and the refusal of the judge of the trial court to cause your petitioner to be so informed and served after

the said judge had been advised of the fact that the nature of the accusation had been maliciously misrepresented to the petitioner orally and that the petitioner had never been informed in any way whatsoever of the actual charge to which he was inveigled into entering a plea of guilty, is a denial to the petitioner herein of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. This holding is in direct conflict with the precedents set by this Court in the cases of *Frank* v. *Mangum,* 237 U. S. 309, and *Garland* v. *Washington,* 232 U. S. 642.

2. The refusal of the judge of the trial court to appoint legal counsel upon the petitioner's request so to do, and to give him sufficient time to seasonably and properly consult with and advise your petitioner of his rights in the premises and to adequately represent him in the proceedings therein, is a denial to the petitioner herein of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. Such a holding is an offense to the principles of justice determined by this Court in the cases of *Powell* v. *Alabama,* 287 U. S. 45; *Johnson* v. *Zerbst,* 304 U. S. 458; *Brown* v. *Mississippi,* 297 U. S. 278; and *Grosjean* v. *American Press Co.,* 297 U. S. 233, 56 S. Ct. 444 at p. 446.

3. The failure of the trial court to acquire competent jurisdiction by not conducting the business of the court according to the settled course of judicial proceedings as established by the laws of the state is a denial of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. This holding is in direct conflict with the opinions of this Court in the cases of *Frank* v. *Mangum, supra;* and *Mooney* v. *Holohan,* 294 U. S. 103.

4. The failure of the judge of the trial court to obtain and record competent, express, and intelligent waivers from your petitioner of the three foregoing constitutional rights of which your petitioner was deprived is a denial of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. This holding is in violation of the maxims of law laid down by this Court in the cases of *Patton* v. *United States*, 281 U. S. 276; and *Johnson* v. *Zerbst, supra.*

All of the above questions were seasonably and properly raised by your petitioner in the District Court of Lancaster County by petition for writ of *habeas corpus*, and in the Supreme Court of Nebraska by assignment of error, and the Supreme Court of Nebraska denied the Federal questions involved by affirming the judgment of the court below dismissing the petition for a writ of *habeas corpus*, and it is submitted that this judgment of the Supreme Court of Nebraska is in conflict with the principles of justice as announced by this Court in the cases cited herein, in that it deprives your petitioner of the due process of law and equal protection of the laws guaranted by the Fourteenth Amendment to the Constitution of the United States. Your petitioner has thus exhausted all available remedies provided by the laws of the State of Nebraska and all process available in the courts of the State of Nebraska.

In support of the foregoing grounds of application, your petitioner submits the accompanying brief setting forth in detail the precise facts and arguments applicable thereto.

Wherefore, your petitioner, Albert Smith, prays that this Court, pursuant to the provisions of Section 237b of the United States Judicial Code, as amended February 13, 1925, 43 Stat. 937, issue a Writ of Certiorari to review the judgment of the Supreme Court of Nebraska, affirming the judgment of the District Court of Lancaster County, Ne-

braska, dismissing your petitioner's petition for a writ of *habeas corpus,* as aforesaid.

All of which is respectfully submitted this — day of —, 194–.

ALBERT SMITH, *Petitioner,*
Box 11283, Lancaster,
Via Lincoln, Nebraska.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 364

ALBERT SMITH,

Petitioner,

vs.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

I.

The failure of the officers of the Trial Court to notify the petitioner of the nature and cause of the accusation for which he was to answer, or to serve him with a copy thereof in writing, deprived the petitioner of his constitutional rights under the Sixth Amendment to the Constitution of the United States.

The Sixth Amendment to the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

> shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

In a like manner, and couched in practically the same language, and certainly with the same meaning, Article I, Section 11 of the Constitution of the State of Nebraska provides that:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Both of the above and foregoing quotations from the Federal and State Constitutions contain certain fundamental rights, among them being the inherent right of a defendant in a criminal prosecution to know the nature and cause of the accusation for which he is to answer, and to have a copy thereof served upon him. However, because the Constitution of Nebraska is not self-enacting, legislation was necessary to provide a definite manner in which a defendant would be served with a copy of the charge. Such legislation was provided by Chapter 29-1802 of the Compiled Statutes of Nebraska for 1929, wherein it is required that:

> "29-1802. Indictment, Recorded by Clerk of District Court, Copy of Felony Indictment Served on Defendant, Arraignment, When Had. The Clerk of the district court shall, upon the filing of any indictment with him, and after the person indicted is in custody or let to bail, cause the same to be entered of record on the

journal of said court, * * *. Within twenty-four hours after the filing of an indictment for felony, and in every other case on request, THE CLERK SHALL MAKE AND DELIVER TO THE SHERIFF, THE DEFENDANT OR HIS COUNSEL A COPY OF THE INDICTMENT, AND THE SHERIFF ON RECEIVING SUCH COPY SHALL SERVE THE SAME UPON THE DEFENDANT, and no one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid." (G. S. p. 821; 1877 p. 4; Ann. 2596; Comp. 8180; R. S. 1913, 9080; C. S. 1922, 10104.) C. S. 1929, p. 732. (Capitals supplied.)

Attached to and made a part of the original petition for a writ of *habeas corpus*, and appearing therein as "Exhibit A", was a certified copy of your petitioner's Information, Judgment, and Sentence as the same appears of record in the office of the Clerk of the District Court of Valley County, Nebraska (R. 6-10). The significant part of that exhibit, insofar as this proposition is concerned, appears on page 9 of the transcript and is herewith quoted for the convenience of the court:

STATE OF NEBRASKA,
County of Valley, ss:

I, — Sheriff in and for Valley County, Nebraska, do hereby certify that on the — day of —, A. D. 19 — in the county aforesaid, I served a true and certified copy of the within information on the herein Defendant — by delivering to him personally a true and certified copy of said information with all endorsements thereon.

Dated at Ord, Nebraska, in said county, this — day of —, A D., 19—.

———,
Sheriff.

The blanks, as your petitioner has shown them in the foregoing quotation of the Sheriff's certification, are exactly as they appear in the certified copy received by your petitioner from the Clerk of the Valley County District Court. Thus, there can be no dispute; it is a fact that your petitioner DID NOT receive a copy of the charge for which he was to answer, and it is therefore also a fact that the provisions of the foregoing Chapter 29-1802 of the Compiled Statutes of Nebraska for 1929, and similar provisions contained in Article I, Section 11 of the Constitution of Nebraska and the Sixth Amendment to the Constitution of the United States, were thereby violated. But fundamental rights of citizens of the United States must not, and shall not, be so violated, as this Court has held many times in the past. A good example upholding this proposition appears in the opinion rendered by this Court in the case of *Snyder* v. *Massachusetts*, 291 U. S. 97, wherein it was held that:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness UNLESS IN SO DOING IT OFFENDS SOME PRINCIPLE OF JUSTICE SO ROOTED IN THE TRADITIONS AND CONSCIENCE OF OUR PEOPLE AS TO BE RANKED FUNDAMENTAL * * * WHAT MAY NOT BE TAKEN AWAY IS NOTICE OF THE CHARGE AND AN ADEQUATE OPPORTUNITY TO BE HEARD IN DEFENSE OF IT. Twining *v.* New Jersey, 211 U. S. 78, 106, 111, 112; Powell *v.* Alabama, 287 U. S. 45. at pages 68, 71; Holmes *v.* Conway, 241 U. S. 624; Cf. Blackmer *v.* United States, 284 U. S. 421, 440." (Capitals supplied.)

When your petitioner was taken before the District Court of Valley County on September 27, 1932, it was his first experience in all of his 56 years in a criminal courtroom.

Yet, common sense told him that he ought to be notified in some manner of the charge for which he was to answer. Realizing this, your petitioner requested a copy of the charge, not once but many times. But each request was parried with the adroit, suave answer of a professional politician. Even the judge told your petitioner that there was no need for him to have a copy of the charge. Truly, your petitioner was duped; duped into believing the officials of the court were his friends; duped into entering a plea without knowing what he was entering a plea to. The unintelligible language of the courtroom meant little to him, and there is no record of the Valley County District Court to show that the petitioner was informed, in language he could reasonably be expected to understand, of the nature of the accusation for which he was to answer. These facts were all brought out clearly in your petitioner's original petition for a writ of *habeas corpus* (R. 1-9), and the deprivation of this right was raised in the form of a substantial Federal question (R. 4-6), all of which was supported by the aforesaid quotation from the case of *Snyder* v. *Massachusetts, supra,* and an opinion rendered by the Supreme Court of Nebraska in the case of *State* v. *Robertson,* 55 Neb. 41, 75 N. W. 37, wherein it was said at page 38 that:

> "* * * This pleading the statute denominates either an indictment, information, or complaint. A copy of this pleading in felony cases MUST be served upon the accused. It is to this that he must plead, and it is upon the allegations of this pleading that a judgment convicting him of having committed the offense charged must stand or fall." (Capitals supplied.)

But the District Court of Lancaster County would not officially recognize the deprivation of a fundamental constitutional right as being sufficient cause for the issuance

of a writ of *habeas corpus,* and the Supreme Court of Nebraska, in considering the same point brought up as an assignment of error, refused to acknowledge the error and held in favor of the respondent.

Although it has been impossible for your petitioner to make an exhaustive research on this particular question, it seems clear that upon the authority of the *Snyder* case, *supra,* the Sixth Amendment to the Constitution of the United States placed upon the trial court, and all of the members thereof, a duty to insure to petitioner notice and service of a copy of the charge for which he must answer; and, if the excuse be given that this is a State case and the Sixth Amendment should not apply thereto, the case of *State* v. *Robertson, supra,* is sufficient authority to cause Article I, Section 11 of the Constitution of Nebraska to place the same identical duty upon the trial court, and all of the members thereof. Your petitioner's contention is not an idle one. Furthermore it is supported by the records of the trial court. Therefore, it is the duty of this Court to hold that your petitioner was deprived of the right, as provided by the Sixth Amendment to the Constitution of the United States, to be informed of the nature and cause of the accusation for which he was to answer, and to be served with a copy thereof.

II.

The failure of the Trial Court to appoint counsel for the petitioner in the trial of his case deprived the petitioner of his constitutional rights under the Sixth Amendment to the Constitution of the United States.

The Sixth Amendment to the Constitution of the United States provides, among other things, that "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence." Substantially the same right is also provided by Article I, Section

11 of the Constitution of Nebraska, *supra,* which is rendered operative by Chapter 29-1803 of the Compiled Statutes of Nebraska for 1929, wherein it is provided that:

> "29-1803. Court Assign Counsel for Accused, When, Counsel Fees Audited and Allowed by Court, Public Defender. The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the penitentiary, IS HEREBY AUTHORIZED AND REQUIRED TO ASSIGN TO SUCH PERSON COUNSEL NOT EXCEEDING TWO, IF THE PRISONER HAS NOT THE ABILITY TO PROCURE COUNSEL, and they shall have full access to the prisoner at all reasonable hours; * * *." (G. S. p. 821; Ann. 2597; Comp. 8181; R. S. 1913, 9081; 1915 p. 336; 1917 p. 335; 1919 p. 163; C. S. 1922, 10105). C. S. 1929, pp. 732, 733. (Capitals supplied.)

The above quoted statute of Nebraska is mandatory in its nature and is necessary because of the requirements of Article I, Section 11 of the Constitution of Nebraska and the Sixth Amendment to the Constitution of the United States. And, in view of the past holdings of this Court on the question of counsel for the defendant in a criminal action, the question of law raised by your petitioner in this proposition cannot be lightly brushed aside, as was done by the Supreme Court of Nebraska.

Bewildered and alone in a criminal court for the first time in his 56 years, and with the persistent feeling that something was amiss, your petitioner requested the appointment of counsel to advise and assist him in his defense. This request was made both BEFORE and AFTER a plea was entered, and each request was refused by the trial court. It is your petitioner's contention that these refusals deprived him of the fundamental right to counsel guaranteed by the Sixth Amendment to the Constitution of the United States. This Court laid great stress on the neces-

sity of this fundamental right in the case of *Powell* v. *Alabama,* 287 U. S. 45, wherein it was stated, at pages 68 and 69, that the:

> "* * * right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

In the *Powell* case, *supra,* the accused was represented by counsel, but this Court held that he had not been represented by COMPETENT counsel and that he had thus been denied the right provided by the Sixth Amendment to the Constitution of the United States. But in the instant case your petitioner was refused the assistance of all counsel, competent or otherwise. Despotic methods such as this were frowned upon by this Court when, in rendering the opinion in the case of *Brown* v. *Mississippi,* 297 U. S. 278, it was stated that:

> "The State may not deny to the accused the aid of counsel. Powell *v.* Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527."

The importance of safeguarding the fundamental right to counsel was also stressed, together with other fundamental rights guaranteed by the first eight amendments to the Constitution of the United States, in the opinion rendered by

this Court in the case of *Grosjean* v. *American Press Co.*, 297 U. S. 233, 56 S. Ct. 444, at page 446.

Then, in the more recent case of *Johnson* v. *Zerbst*, 304 U. S. 458, this Court held that:

> "The PATTON case noted approvingly a State court decision (Hack *v.* State, 141 Wisconsin 346, 351) pointing out that the humane policy of modern criminal law had altered conditions which had existed in the 'days when the accused could not testify in his own behalf, (and) was not furnished Counsel,' and which had made it possible to convict a man when he was 'without money, without counsel, without ability to summon witnesses and not permitted to tell his own story, * * *. * * * The constitutional right (the Sixth Amendment) of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel."

After diligent research your petitioner has come to the conclusion that there is no "State court decision" of the State of Nebraska which this Court could note "approvingly" on this particular subject, but that is all the more reason why this Court should uphold the petitioner's contention on the vital Federal question. Clearly, the District Court of Lancaster County erred when it held that the refusal of the assistance of counsel, as provided by the Sixth Amendment to the Constitution of the United States, was not sufficient cause for the issuance of a writ of *habeas corpus*, and just as clearly, the Supreme Court of Nebraska erred in a like manner when it upheld the judgment of the District Court of Lancaster County. Because of these facts, and by authority of the opinions rendered by this Court and cited and quoted herein, it is the duty of this Court to declare that your petitioner was deprived of the right to be represented by counsel, as aforesaid.

III.

The failure of the trial court to acquire competent jurisdiction before proceeding with the petitioner's case deprived the petitioner of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Here again the petitioner has raised an important Federal question, a question involving due process of law and equal protection of the laws. In the instant case, as the record shows (R. 6-10), the petitioner was charged, tried, sentenced, and committed to the penitentary within a period of about eight hours. This, your petitioner contends, is a violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States because it is a denial of the equal protection of the laws of Nebraska as guaranteed by that same amendment to the Constitution of the United States. The violation as contended by the petitioner was as follows.

Chapter 27-317 of the Compiled Statutes of Nebraska for 1929 provides as follows, insofar as it is related to the instant case:

> "27-317. District Judge, Jurisdiction in Chambers. A judge of the district court may sit at chambers any-

where within his district and upon ten days' notice to the adverse party or his attorney of record, shall have power to: * * * Tenth. Receive a plea of 'guilty' from any person charged with a felony and pass sentence thereon, upon ten days' notice to the prosecuting attorney. * * *." (1879 p. 90; 1913 p. 635; Ann. 4749; Comp. 2731; R. S. 1913, 1176; 1921 p. 676; C. S. 1922, 1099). C. S. 1929, p. 641.

There can be no doubt or dispute as to the meaning of this statute, Chapter 27-317, *supra*. A judge of the district court in the State of Nebraska MUST give at least a ten days' notice to the defendant or his attorney, and to the county attorney, that he will accept a plea of guilty in chambers. Then, and only then, does the court acquire jurisdiction so to do, and, AFTER the ten days have passed, the court may then accept the plea of guilty. But, it will be said, in the instant case the plea of guilty was made in open court. It is true that the record (R. 7) does say that your petitioner was "present in person in Open Court," but this one particular phrase in the record does not state the truth. If Open Court can be held in a room less than twelve feet square, containing a small desk, bookshelves, and other appurtenances ordinarily found in and connected with a private office, then it is quite possible that your petitioner was tried in Open Court. But, if this be true, then your petitioner still contends that he was not accorded the equal protection of the laws as required by the Fourteenth Amendment to the Federal Constitution, and because of the following reasons.

If the plea was made by the defendant, the petitioner herein, in open court, then it was made unlawfully because there is no statute of the State of Nebraska, other than Chapter 27-317, *supra*, which gives a district court of the State of Nebraska jurisdiction to accept a plea of guilty in a criminal case. Of course this statement will be disputed by the counsel for the respondent, and it is quite possible

that reference will be made to Chapter 27-302 of the Compiled Statutes of Nebraska for 1929 wherein a general jurisdiction is conferred upon district courts, but that same statute also makes an exception, as follows:

> "27-302. District Judge, Jurisdiction. The district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, EXCEPT WHERE OTHERWISE PROVIDED." (1879 p. 87; Ann. 4734; Comp. 2716; R. S. 1913, 1161; C. S. 1922, 1084.) C. S. 1929, p. 639. (Capitals supplied.)

In view of the fact that Chapter 27-317, *supra,* does specifically provide HOW AND WHEN a plea of guilty made by a defendant may be accepted by the judge of a district court, and, in view of the fact that Chapter 27-302, *supra,* does provide general jurisdiction EXCEPT WHERE OTHERWISE PROVIDED, the petitioner's argument herein cannot be logically disputed. It has been OTHERWISE PROVIDED that, when and if a judge of a district court of Nebraska shall fulfill certain rigid requirements, he may then, but not until then, accept a plea of guilty in a criminal case. It is not logical to try to interpret these two Nebraska statutes in any other manner, because to do so would be to say that, if a judge of a district court should happen to be in one particular part of a courthouse he could accept a plea of guilty the instant it was made, but, on the other hand, if he should happen to be in another part of the same courthouse he would have to give a ten days' notice to the defendant that he intended to accept the plea. Such reasoning is not logical, but it is the only reasoning possible if your petitioner's interpretation is not accepted.

Likewise, it cannot be said that there is a confliction between these two statutes, because if such were the case, the final analysis of this jurisdictional question involving

the equal protection of the laws would have to resolve in favor of the petitioner.

That a court of a state MUST proceed in a criminal prosecution in the manner prescribed by law has been an accepted fact since the early history of this nation, for this Court held, in the case *of Ex parte Bollinan,* 4 Cranch. 93, that:

> "Courts which are created by written law and whose jurisdiction is defined by written law cannot transcend that jurisdiction."

This doctrine has been followed religiously in most instances, as can be demonstrated by a recent opinion of the Supreme Court of the State of Wisconsin, wherein it was held, in the case of *State ex rel. Lang* v. *Civil Court of Milwaukee County,* 280 N. W. 347 at page 349, that:

> "It is true, as respondents argue, that as the proceeding is statutory in its origin, the legislature was authorized to and did fix the issues and the manner in which they should be tried (*Francken* v. *State,* 190 Wis. 424, 209 N. W. 766); THAT STATUTORY POWERS CONFERRED UPON A COURT OF INFERIOR JURISDICTION MUST BE EXERCISED AND EXECUTED IN SUBSTANTIALLY THE MANNER PRESCRIBED BY THE STATUTE, OR THE JUDGMENT WILL BE VOID (33 C. J. p. 1064); AND THAT, ALTHOUGH A COURT MAY HAVE HAD JURISDICTION OF SUCH AN ACTION, IT MAY LOSE IT AND DO ACTS THEREIN WITHOUT THE AUTHORITY OF THE LAW WHICH WILL THEN BE VOID FOR WANT OF JURISDICTION (*Two Rivers Mfg. Co.* v. *Beyer et al.,* 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131)." (Capitals supplied.)

This Court has literally demanded that this doctrine be observed, for it was held, in the cases of *Frank V. Mangum,* 237 U. S. 309, and *Johnson* v. *Zerbst,* 304 U. S. 458, that a

court's jurisdiction may be lost "in the course of proceedings", and this Court even outlined a few of the many ways that jurisdiction could be lost "in the course of proceedings." But in the instant case, the District Court of Valley County, Nebraska, did not have any jurisdiction to lose because jurisdiction, "created by written law," was never acquired in accordance with the provisions of that written law. Furthermore, the JOURNAL ENTRY of the trial court (R. 7) clearly shows that your petitioner's plea of guilty was not accepted, because the acceptance thereof was not recorded. The Legislature of Nebraska has provided but one jurisdiction for the acceptance of a plea of guilty in felony cases, and the trial court, realizing this fact, and also realizing that the requirements of that jurisdiction had not been complied with, failed to enter the acceptance in the record. Thus, your petitioner was tried and sentenced by a court of incompetent jurisdiction, without being convicted, and because of this fact the Supreme Court of Nebraska erred when it affirmed the judgment of the District Court of Lancaster County, wherein it was held that the deprivation of your petitioner's right to a trial by a court of competent jurisdiction was not a denial of the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. There can be no dispute of the fact that your petitioner was deprived of the right to be tried by a court of competent jurisdiction, as aforesaid, and it is the duty of this Court to so hold.

IV.

The failure of the Trial Court to obtain and record express and intelligent waivers from the petitioner indicates that no waivers were made, and a plea of guilty is not necessarily a judicial confession of guilt, nor does a plea of guilty waive the fundamental rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

The Sixth and Fourteenth Amendments to the Constitution of the United States provide certain fundamental rights of which no person residing in the jurisdiction of the United States may be deprived in the course of a criminal prosecution, among them being the defendant's right to know the nature and cause of the accusation for which he is to answer and to be served with a copy thereof, the right to the aid of competent legal counsel, and the right to a fair and impartial trial before a court of competent jurisdiction. Of these three rights, this Court has held that only the aid of legal counsel may be waived, and then only when the waiver was of an express and intelligent nature. It has also been held by this Court that such waivers, if they are made, should be properly recorded by the trial court. In the instant case, the JOURNAL ENTRY of the trial court (R. 7) shows that only one waiver was made by your petitioner, that being the waiver of the right to preliminary examination. In the foregoing arguments your petitioner has contended that he was deprived of the three fundamental rights named above. Your petitioner further declares, and the record does not dispute it, that he did not INTENTIONALLY, INTELLIGENTLY OR EXPRESSLY WAIVE ANY OF THESE RIGHTS. In spite of this fact, the Supreme Court of Nebraska, in affirming the judgment of the District Court

of Lancaster County, literally held that your petitioner had waived his right to be informed of the nature and cause of the accusation and to be served with a copy thereof, his right to the aid of counsel, and his right to be tried by a court of competent jurisdiction. Clearly, the Supreme Court of Nebraska is in error, because this Court held, in the case of *Johnson* v. *Zerbst,* 304 U. S. 458, that:

> "The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. THIS PROTECTING DUTY IMPOSES THE SERIOUS AND WEIGHTY RESPONSIBILITY UPON THE TRIAL JUDGE OF DETERMINING WHETHER THERE IS AN INTELLIGENT AND COMPETENT WAIVER BY THE ACCUSED. WHILE AN ACCUSED MAY WAIVE THE RIGHT TO COUNSEL, WHETHER THERE IS A PROPER WAIVER SHOULD BE CLEARLY DETERMINED BY THE TRIAL COURT, AND IT WOULD BE FITTING AND APPROPRIATE FOR THAT DETERMINATION TO APPEAR UPON THE RECORD.' (Capitals supplied.)

Cf. Patton v. *United States,* 281 U. S. 276.

It has been said by the Supreme Court of Nebraska that a person charged with crime may, by a plea of guilty, waive all the rights secured to him by Article I, Section 11, of the Constitution of Nebraska, *supra.* The fact that the Supreme Court of Nebraska neglected to include those rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States is glaringly apparent by their very absence. It is respectfully submitted that a plea of guilty to a criminal charge DOES NOT constitute a waiver to any of the fundamental constitutional guaranties of the Sixth and Fourteenth Amendments to the Con-

stitution of the United States, because this Court held, in the case of *Johnson* v. *Zerbst, supra,* that:

> "The purpose of the constitutional guaranty of the right to Counsel is to protect an accused from conviction resulting from ihs own ignorance of his legal and constitutional rights, AND THE GUARANTY WOULD BE NULLIFIED BY A DETERMINATION THAT AN ACCUSED'S IGNORANT FAILURE TO CLAIM HIS RIGHTS REMOVES THE PROTECTION OF THE CONSTITUTION." (Capitals supplied.)

Such a determination by this Court automatically nullified all opinions of the Supreme Court of Nebraska wherein it was held that a plea of guilty waives all rights secured to a defendant by Article I, Section 11, of the Constitution of Nebraska, because those same rights included in Article I, Section 11, of the Nebraska Constitution are also guaranteed by the Sixth Amendment to the Constitution of the United States. Likewise, an accused could be ignorant of, and thus fail to claim, his rights before entering a plea of guilty; but, by the very wording of this quotation from the *Johnson* case, *supra,* such an ignorant act would not nullify the guaranties of the right to counsel, of the right to be notified of the nature and cause of the accusation, or of the right to a trial by a court of competent jurisdiction.

However, even though your petitioner was, and still is, ignorant of law and legal procedure, HE VERY DEFINITELY DID REQUEST A COPY OF THE CHARGE FOR WHICH HE WAS TO ANSWER, AND THE ADVICE AND ASSISTANCE OF LEGAL COUNSEL, BOTH BEFORE AND AFTER HE ENTERED HIS PLEA OF GUILTY, AND BOTH OF THESE REQUESTS WERE REFUSED BY THE TRIAL COURT. It cannot be said, therefore, that he waived these rights. As for the third right claimed by your petitioner, it is a well known

fact that it is impossible for a defendant, by any plea or consent on his part, either express or inferential, to waive the jurisdiction of the court. This matter is well covered by the following:

> "The objection that a court has no jurisdiction of the subject matter is not waived by plea or by going to trial, and may be raised on motion in arrest of judgment, on appeal, or by petition for a writ of *habeas corpus.*" 16 C. J. 184, Section 257;
>
> *Hager* v. *Falk,* 82 Wis. 644, 52 N. W. 432.

The three rights claimed herein by your petitioner, namely, the right to notice and service of the charge, the right to counsel, and the right to trial by a court of competent jurisdiction, have all been classified by this Court, at one time or another, as fundamental rights. Mr. Cooley, in Constitutional Limitations (Page 182), says:

> "A party may consent to waive rights of property, but the trial and punishment for public offenses are not within the province of individual consent or agreement."

This means that, by individual consent or agreement, fundamental rights cannot be waived. Likewise, in Hawes on Jurisdiction, Sections 11 and 12, it is said that "A party cannot waive a constitutional right when its effect is to give a court jurisdiction," and precisely the same ruling was made by this Court in the case of *Ex parte Bain,* 121 U. S. 1.

The record (R. 7) shows that the rights claimed herein were not waived, and it is so claimed by your petitioner. Therefore, it must be held, it is submitted, that your petitioner did not expressly nor intelligently waive his right to notice and service of the charge, his right to the assistance of counsel, or his right to trial by a court of competent jurisdiction—all of which are rights secured by the

Sixth and Fourteenth Amendments to the Constitution of the United States—by his ignorant plea of guilty to a charge the nature and cause of which he knew nothing. Equal protection of the laws and due process of law cannot be ignorantly waived, and the deprivation of these rights without a waiver is an important Federal question that this Court must decide in favor of the petitioner by reversing the judgment of the Supreme Court of Nebraska.

V.

The trial, conviction without finding of guilt, sentence, and imprisonment of the petitioner under the circumstances disclosed herein deprived the petitioner of his liberty without the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Your petitioner has shown beyond any possible doubt (1) that he was deprived of his constitutional right to know the nature and cause of the charge for which he was to answer and to be served with a copy thereof, (2) that he was deprived of his constitutional right to the aid of competent legal counsel, and (3) that he was deprived of his constitutional right to a trial by a court of competent jurisdiction. It has been further shown by the petitioner that he did not, either expressly, intelligently, nor in any other manner, waive any of these fundamental constitutional rights, each of which is provided by the Sixth Amendment to the Constitution of the United States. It is the contention of your petitioner that the deprivation of the foregoing rights deprived him of his liberty without the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The requirements of "due process of law" and "equal protection of the laws", as these two phrases appear in

Section 1 of the Fourteenth Amendment to the Constitution of the United States, are best defined in a general manner in the opinion rendered by this Court in the case of *Duncan* v. *Missouri*, 152 U. S. 377, wherein it is said, at page 382, that:

> "Due process of law and the equal protection of the laws are secured only when the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government', citing State *v.* Guerringer, 265 Mo. 408; Hopt *v.* Utah, 110 U. S. 574."

The individual could be subjected to the "arbitrary exercise of the powers of government" in many ways, but in the instant case the District Court of Valley County, representing the judicial branch of the government of the State of Nebraska, vented an arbitrary exercise of its power over your petitioner by depriving him of three fundamental rights guaranteed by the Constitution of the United States. In the case of *DeJonge* v. *Oregon*, 299 U. S. 353, Mr. Chief Justice Hughes said that:

> "A conviction under a criminal charge not made is a denial of due process."

Can it be said, under the circumstances related herein and verified by the records of this case, that a criminal charge was made? Is a criminal charge made if notice and service of same are not made upon the defendant? The best general expression of this principle stated in the *DeJonge* case, *supra*, is found in the opinion rendered by this Court in the case of *Powell* v. *Alabama*, 287 U. S. 45, wherein it is stated at pages 68 and 71 that:

> "It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the

> case, constitute basic elements of the constitutional requirements of due process of law. The words of Webster, so often quoted, that by the law of the land is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions. In Holden *v.* Hardy, 169 U. S. 366, 389, 42 L. Ed. 780, 18 S. Ct. 383, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard' and Mr. Justice Field, in an earlier case, Galpin *v.* Page, 18 Wall. 350, 368, 369, 21 L. Ed. 959, 963, 964, said, that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' "

This Court also upheld these same "immutable principles of justice", and especially the right of the defendant to notice and service of the charge, in the cases of *Rogers* v. *Peck*, 199 U. S. 425, 435, and *Garland* v. *Washington*, 232 U. S. 642 at page 645.

And again, in the case of *Powell* v. *Alabama, supra,* at page 68 therein, this Court held that in a proper case:

> "The aid of counsel is essential to due process."

It must be held, it is submitted, that the instant case is a proper case, because if your petitioner had had the advice of counsel he would not have entered a plea to a charge of which he knew nothing, and had he known the nature of the charge, the plea of guilty would not have been entered. It cannot be said, nor is it supported by the JOURNAL ENTRY (R. 7) or any of the other records

of the trial court (R. 6-10), that your petitioner knew or understood the natural effects of his plea of guilty.

It will probably be said by the learned counsel for the respondent, as it has already been said by the same counsel in opposition briefs recently filed with this Court in the cases of *Thompson* v. *O'Grady,* No. 84, October Term, 1940, and *Alexander* v. *O'Grady,* No. 126, October Term, 1940, that "It is elementary learning that the Sixth Amendment to the Constitution of the United States does not guarantee procedure in criminal prosecutions in courts of the several states." It is respectfully submitted that such a statement will not "hold water" in this Court for the very reason that it is contrary to the precepts of justice as interpreted in the many opinions cited herein. This is especially true in the case of *Grosjean* v. *American Press Co.,* 297 U. S. 233, 56 S. Ct. 444, wherein it was alleged that the freedom of the press, as provided by the First Amendment to the Constitution of the United States, had been abridged in contravention of the due process clause in Section 1 of the Fourteenth Amendment to the Constitution of the United States. Although the Grosjean case, *supra,* came up to this Court by process of direct appeal, and, although the case involved the deprivation of civil rights, the opinion rendered by this Court left no doubt of the fact that certain fundamental rights, safeguarded by the first eight amendments to the Constitution of the United States against federal action, were also safeguarded against state action, in both civil and criminal cases, by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States. This fact was brought out clearly, together with the reasons of this Court for so holding, when it was stated, at page 446 of the Supreme Court Reporter, that:

> "In the case of Hurtado *v.* California, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232, this court held that the

term 'due process of law' does not require presentment or indictment by a grand jury as a prerequisite to prosecution by a state for a criminal offense. And the important point of that conclusion here is that it was deduced from the fact that the Fifth Amendment, which contains the due process of law clause in its national aspect, also required an indictment as a prerequisite to a prosecution for crime under federal law; and it was thought that since no part of the amendment could be regarded as superfluous, the term 'due process of law' did not, *ex vi termini,* include presentment or indictment by a grand jury in any case; and that the due process of law clause of the Fourteenth Amendment should be interpreted as having been used in the same sense, and as having no greater extent. BUT IN POWELL *V.* STATE OF ALABAMA, 287 U. S. 45, 65, 68, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, WE HELD THAT IN THE LIGHT OF SUBSEQUENT DECISIONS THE SWEEPING LANGUAGE OF THE HURTADO CASE COULD NOT BE ACCEPTED WITHOUT QUALIFICATION. WE CONCLUDED THAT CERTAIN FUNDAMENTAL RIGHTS, SAFEGUARDED BY THE FIRST EIGHT AMENDMENTS AGAINST FEDERAL ACTION, WERE ALSO SAFEGUARDED AGAINST STATE ACTION BY THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT, AND AMONG THEM THE FUNDAMENTAL RIGHT OF THE ACCUSED TO THE AID OF COUNSEL IN A CRIMINAL PROSECUTION." (Capitals supplied.)

Because of the foregoing opinion of this Court in the Grosjean case, *supra,* there can be no dispute of the fact that your petitioner's right to notice and service of the charge, his right to the aid of competent legal counsel, and his right to trial by a court of competent jurisdiction are all secured by the Sixth Amendment to the Constitution of the United States. Likewise, there can be no doubt but that the denial of these rights violated those "fundamental

principles of liberty and justice which lie at the base of all our civil and political institutions'' (*Hebert* v. *Louisiana,* 272 U. S. 312) and which, being embodied in the concept ''due process of law''; are protected against hostile state invasion by the due process clause of the Fourteenth Amendment to the Constitution of the United States, citing:

Nielsen, Petitioner, 131 U. S. 176;
Frank v. *Mangum,* 237 U. S. 309;
Brown v. *Mississippi,* 297 U. S. 278.

Because of the above and foregoing reasons it must be held, it is submitted, that your petitioner has been deprived of his liberty without the equal protection and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VI.

The petitioner's imprisonment in violation of the rights secured to him by the Sixth Amendment to the Constitution of the United States, and guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, is a nullity and he is entitled to be released upon his writ of habeas corpus.

Assuming that your petitioner has been deprived of his constitutional rights, as has been conclusively shown in the preceding arguments, the question still remains whether this abuse can be corrected by *habeas corpus.* The District Court of Lancaster County was troubled by this question, and, in fact, dismissed the petition for a writ of *habeas corpus* on the assumption that the deprivation of constitutional rights was not sufficient cause for the issuance of such a writ, and advised, instead, that such a deprivation should be corrected by the Board of Pardons of the State of Ne-

braska (R. 14-15). Likewise, because of the nature of the contents of the order rendered on May 20, 1940 (R. 33), and because of the final judgment rendered on June 3, 1940 (R. 34), it is quite evident that the Supreme Court of Nebraska also has the same arrogant disregard for the rights guaranteed to a defendant in a criminal action by the Sixth and Fourteenth Amendments to the Constitution of the United States. Plainly, the aforesaid order and judgment of the Supreme Court of Nebraska completely destroy the substance of the right to notice and service of the charge, the right to counsel, and the right to trial by a court of competent jurisdiction.

The questions here presented are not questions of mere error in the course of proceedings in the trial court, but are questions of whether a judgment entered in a criminal trial conducted in violation of the requirements of due process of law and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, is such that it is void and may be questioned collaterally. It is respectfully submitted that these precise questions have been answered in the affirmative many times by this Court.

Where circumstances surrounding the trial take from it the essential elements necessary to constitute a hearing such as is demanded by due process, this Court has not hesitated to entertain a collateral attack. Thus, in *Moore* v. *Dempsey,* 261 U. S. 86, where the pressure of a riotous mob turned the trial into a mere sham, and in *Mooney* v. *Holohan,* 294 U. S. 103, where the deception of court and jury by the intentional use of perjured testimony was held to make of the trial a mere pretense, this Court held that the accused could question the cause for his detention through *habeas corpus* proceedings. In neither of these cases did this Court decline to entertain the petition on the ground that by so doing the writ would be used as a substitute for a writ of

error, although in both cases it is unquestioned that at the time of the original trial, the trial court had jurisdiction of the accused and of the subject matter. The trial court in both cases lost jurisdiction when circumstances arose that turned the trial into a mere pretense. And so it was in the instant case when your petitioner, Albert Smith, was arraigned for plea without counsel to advise him, on a charge the nature and cause of which he had never been notified, before a court that had failed to acquire competent jurisdiction. The trial court did not have jurisdiction to entertain, nor did it pass upon, your petitioner's plea of guilty; neither did it have jurisdiction to pass judgment or sentence upon your petitioner. Such actions were completely void. As was said by this Court in the case of *Hans Nielsen, Petitioner,* 131 U. S. 176,

> "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. This was the case in Ex parte Lange, where the Court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of Snow: The Court had authority over the case, but we held that it had no authority to give judgment against the prisoner. HE WAS PROTECTED BY A CONSTITUTIONAL PROVISION, SECURING TO HIM A FUNDAMENTAL RIGHT. IT WAS NOT A CASE OF MERE ERROR IN LAW, BUT A CASE OF DENYING TO A PERSON A CONSTITUTIONAL RIGHT. AND WHERE SUCH A CASE APPEARS ON THE RECORD, THE PARTY IS ENTITLED TO BE DISCHARGED FROM IMPRISONMENT." (Capitals supplied.)

The Supreme Court of Nebraska has, in the past, rendered a few decisions upholding a collateral attack upon a void judgment, one of the most representative being the opinion rendered in the case of *Ex parte Resler,* 115 Neb. 335, 212 N. W. 765, wherein it was held that:

> "It is firmly established that if a court or a judge thereof which renders a judgment, or who enters an order, has no jurisdiction of the act done, either because the proceedings or the law under which it is taken is unconstitutional, OR FOR ANY OTHER REASON THE JUDGMENT IS VOID, IT MAY BE QUESTIONED COLLATERALLY, AND A DEFENDANT WHO IS IMPRISONED UNDER AND BY VIRTUE OF IT MAY BE DISCHARGED." (Capitals supplied.)

But it is quite apparent that the opinion of the Supreme Court of Nebraska in the *Resler* case, *supra,* IS NOT RULING CASE LAW IN THE STATE OF NEBRASKA. If it was, this action to this Court would not be necessary.

Neither this Court, nor the respondent herein, can truthfully make a statement similar to that made by this Court in the case of *Mooney* v. *Holohan,* 294 U. S. 103, wherein it was said that:

> "We are not satisfied, however, that the state of California has failed to provide such corrective process. The prerogative writ of *habeas corpus is* available in that state. * * * Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution (of the United States). *Robb v. Connally,* 111 U. S. 624, 637, 4 S. Ct. 544, 28 L Ed. 542. In view of the dominant requirement of the Fourteenth Amendment, we are not at liberty to assume that the state has denied to its court jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose."

It is true that the State of Nebraska has not denied to its courts jurisdiction to redress a prohibited wrong by *habeas corpus,* and it is also true that such a prerogative writ is available by law in the State of Nebraska. However, an exhaustive research by your petitioner, supported by the records in the instant case, discloses the fact that the deprivation of a right secured to a defendant in a criminal prosecution by the Sixth Amendment to the Constitution of the United States is generally considered by the courts of the State of Nebraska to be mere error. Because of this fact, there are apparently no prohibited wrongs in the State of Nebraska. Furthermore, if the petitioner in a *habeas corpus* action be a pauper who is unable to retain counsel or pay for printed briefs, he cannot have his case heard in the courts of the State of Nebraska, no matter to what extent his constitutional rights may have been violated (R. 13, 13-21, 28-33, 34). In addition to this, the procedure of CORAM NOBIS has been abolished by law in the State of Nebraska, and the Board of Pardons of the State of Nebraska is confined to considering the propriety of extending executive clemency (R. 17) which it declined to do in the instant case. At the time of your petitioner's commitment to the penitentiary, he was ignorant of his right to appeal, and, even had he known of this right, his lack of funds to hire counsel or to pay the cost of an appeal would have been stumbling blocks that he could not have overcome. Because of these facts, your petitioner has exhausted all of his rights in the State of Nebraska and no other procedural remedy remains EXCEPT THE WRIT OF HABEAS CORPUS. In the case of *Johnson* v. *Zerbst,* 304 U. S. 458, 58 S. Ct. 1019, conditions similar to these outlined by your petitioner existed and were depriving the petitioner Johnson of his rights. Mr. Justice Black, in speaking for the Court, said:

> "If these contentions be true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by HABEAS CORPUS. Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty it may well be said —as in Mooney *v.* Holohan, 294 U. S. 103, 113,—that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' (Mooney *v.* Holohan, supra, 112) but destructive of a constitutional guaranty specifically designed to prevent injustice."

This Court should not be troubled as to the legitimacy of a collateral attack in the instant case. It has been proven beyond all possible doubt that the judgment and sentence are wholly void for want of the essential elements of due process of law, and the proceeding thus vitiated could be challenged in any appropriate manner. *Mooney* v. *Holohan, supra.* It was challenged in both the District and Supreme Courts of the State of Nebraska by the express invocation of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Nebraska entertained the challenge, considered the Federal questions thus presented, found no error in the judgment of the lower court, and declined to enforce your petitioner's constitutional rights. The Supreme Court of the State of Nebraska thus denied Federal questions fully established and specially set up and claimed, and its judgment must therefore be reversed, citing:

Johnson v. *Zerbst,* 304 U. S. 458;
Herndon v. *Lowry,* 301 U. S. 42;
Moore v. *Dempsey,* 261 U. S. 86, 91;
In re Medley, 134 U. S. 160.

Conclusion.

Equal protection and due process under the law are the pillars upon which our democracy rests. A denial of these fundamental rights to any citizen of the United States is a threat to the liberties of all. Liberty must be taken only in accordance with those established modes of procedure which have been tried and tested by time. If the experience of our centuries of the common law has demonstrated that trial and conviction by a court of competent jurisdiction, where the defendant has been properly notified and served with a copy of the charge for which he is to answer and is appropriately represented and advised by competent legal counsel, is better than and preferable to a plea of guilty obtained by deceit in a trial by ordeal and mobocracy, then it is respectfully submitted that the questions raised in this petition call for the exercise by this Court of its supervisory powers to the end that rights guaranteed under the Constitution of the United States and recognized by all civilized nations shall be preserved.

Respectfully submitted,

ALBERT SMITH,
Petitioner.

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